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10/587,779	07/28/2006	Gordon Thelwell	5897-000029/US/NP	9918

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EXAMINER

RODDEN, JOSHUA E

ART UNIT	PAPER NUMBER
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3637

MAIL DATE	DELIVERY MODE
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10/15/2008

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/587,779	Applicant(s) THELWELL, GORDON	
	Examiner Joshua Rodden	Art Unit 3637	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 13 August 2008.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 61-71 and 74-87 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 61-71 and 74-87 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 23 August 2006 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Claims 72, 73, and 88 have been cancelled.

Claim Rejections - 35 USC § 112

1. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.
2. Claims 61-71 and 74-87 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.
3. Claim 61 recites the limitation "said column" in Line 2. There is insufficient antecedent basis for this limitation in the claim. The upright column was not positively cited in Lines 1 and 2 of claim 61. Therefore, it is unknown as to whether the applicant is attempting to claim the subcombination of a column protector or the combination of a column protector and a upright column. For purpose of examination, any references regarding the upright column will be treated as involving intended use/functional language and will be given little to no patentable weight.
4. Claim 61 recites the limitation "said substantially cylindrical "C" shaped cross section outer surface" in Line 20. There is insufficient antecedent basis for this limitation in the claim. For purpose of examination, it is assumed that the applicant is referring to "a substantially part cylindrical outer surface" as recited in Line 19 of claim 1.
5. Claims 61, 64, 65 and 81 are rejected under 35 U.S.C. 112, second paragraph for use of the term "substantial." Such term is considered to be indefinite because the

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specification lacked some standard for measuring the degree intended. See *Ex parte Oetiker*, 23 USPQ2d 1641 (Bd. Pat. App. & Inter. 1992). See also MPEP 2173.05(b).

For purposes of examination, the following phrases have been construed to mean:

-In Claim 61, a “substantially part cylindrical “C” shaped cross section outer shell” is construed as not really cylindrical or “C” shaped.

-In Claim 61, a “substantially solid part cylindrical member” is construed as not being solid.

-In Claim 61, a “substantially part cylindrical outer surface” is construed as not really cylindrical.

-In Claim 64, a “substantially “C” shaped cross section” is construed as not really being “C” shaped.

-In Claim 65, the “substantially parallel opposing edges” are construed to be not parallel.

In Claim 81, a “substantially part cylindrical inner surface” is construed to mean not really cylindrical.

Claim Rejections - 35 USC § 103

6. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

7. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

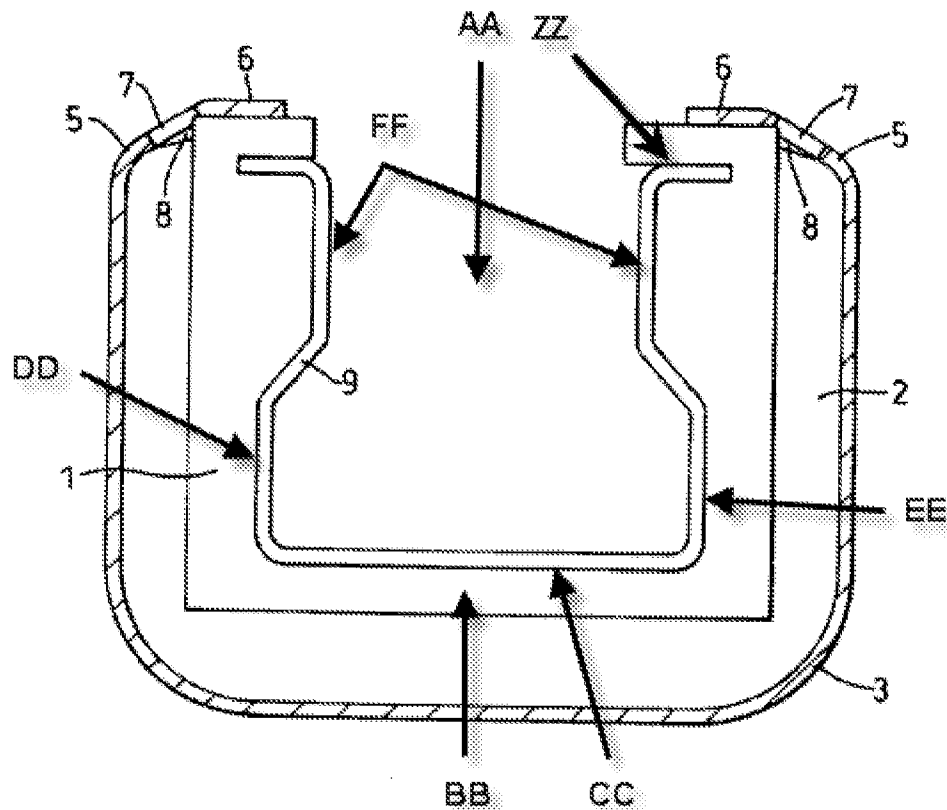
1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

8. Claims 61-64, 71, 75, 80-83, 86 and 87 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.K. Patent Application GB 2,321,688 (Ian) in view of European Patent Application No. 0,571,082 A1 (Boast).

Regarding **Claim 61**, **Ian** teaches; a column protecting device (3) for protection of an upright column (9) of a racking system, (Figure 3); wherein the column (9) has a channel shaped cross section (AA) having a substantially rectangular front portion (BB) consisting of a front member (CC), and a first (DD) and second (EE) side member, (Annotated Figure 2 Below); the column protector device (3) being “capable of” clipping/clamping onto an upright column via plastic cable ties, (Page 2, Lines 15-21 of the specification); the protector device further comprises a rigid, “substantially part cylindrical “C” shaped cross section” outer shell (2 and 3), and an inner liner (1) shaped to fit within the outer shells (2 and 3), (Figure 2 and Page 3, Lines 3-8 of the specification); wherein the outer shell (2 and 3) is capable of fitting around the upright column so that the outer shell (2 and 3) retains to the column (9) without further fixtures, (Page 4, Lines 10-14); the outer shell (2 and 3) also surrounds the front member (CC) and partially surrounds (does not surround the tips labeled as ZZ) the first (DD) and

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second (EE) side members, (Annotated Figure 2); the inner liner (1) being retained between the outer shell (2 and 3) and the column (9), (Figure 3); the inner liner (1) comprises a substantially "U" shaped channel (The inner surface of the liner (1) touching the upright column (9)) providing for a flush interface between the inner liner (1) and the upright column (9), (as seen in Figure 2).



Annotated Figure 2

Ian does not teach the outer surface of the inner liner (the portion of the inner liner (1) that is in contact with the outer shell (2) in Figure 2) having a substantially cylindrical shaped outer surface. However, **Boast** teaches the outer surface of the inner liner (104 and 105) having a substantially cylindrical shaped outer surface which makes contact with an outer shell (102), (Figure 2). Therefore, it would have been obvious to

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one of ordinary skill in the art to modify the outer surface of the inner liner (1) of **Ian** to have a substantially cylindrical shaped outer surface as taught by **Boast** for the purpose of a user design choice.

The phrase, “thereby protecting the front and parts of the side members” is considered functional language and is given no patentable weight.

Regarding **Claim 62**, **Ian** teaches each first and second side member comprising an outer side member (DD and EE) and an inner side member (FF), wherein the outer shell (3) surrounds the front member (CC) and partially surrounds (does not surround the tips labeled as ZZ) the first (DD) and second (EE) side members, (Annotated Figure 2 Above); and the peripheral edge (the outer edge of the entire shell (3)) of the outer shell (3) is adjacent to the column where the column is relatively narrower, (Annotated Figure 2).

Claim 62 does not clearly define what the “peripheral edges” of the outer shell constitute and therefore it is understood that the peripheral edges of the outer shell are outer surfaces of the outer shell (an example is the actual top of outer shell (3) as seen in Annotated Figure 3 of **Ian** below).

The term “peripheral” is defined by www.dictionary.com as “Related to, located in, or constituting an outer boundary or periphery.” Furthermore, the phrase “thereby protecting them” is considered functional language and is given little to no patentable weight.

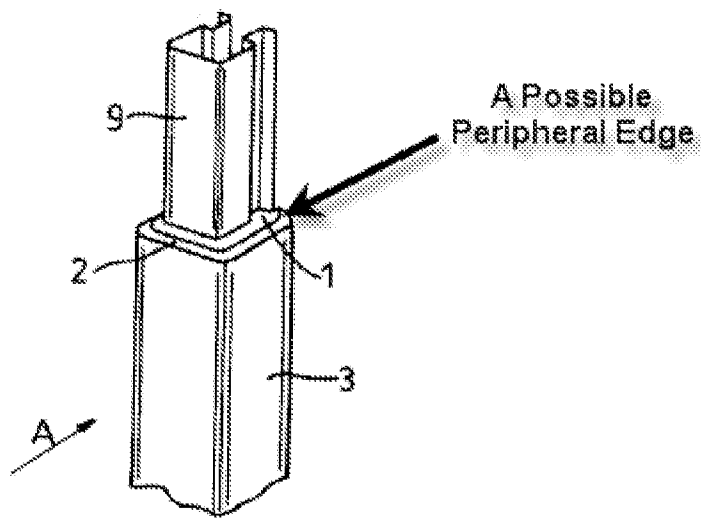


Fig. 3

Regarding **Claim 63**, **lan** teaches the device (3) capable of attaching to the front or lateral sides of an aisle facing an upright column wherein the column resides in a channel of the outer shell (2 or 3), (Figure 3 and Page 1, Lines 5-11).

Regarding **Claim 64**, **lan** teaches the outer shell (3) having a “C” shaped cross section, (Figure 2).

Regarding **Claim 71**, **lan** teaches the outer shell being made from polycarbonate, (Page 2, Line 8). It should be understood that the following materials are all well known in the art as substitutions for polycarbonate: resilient elastomeric polymer based materials; polyethylene; high density polyethylene; polypropylene; polyvinylchloride; polystyrene; plastic; or a mixture of plastics.

Regarding **Claim 75**, **lan** teaches the inner liner (1) being made from a compressive composite material, (Figure 2 and Page 2, Lines 1-7). It should be understood that the following materials are all well known in the art as substitutions for a

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compressive composite material: polyethylene; polypropylene; polycarbonate; polyvinylchloride; polystyrene; natural rubber foam; synthetic rubber foam; closed cell SBR foam material.

Regarding **Claim 80**, **lan** teaches the inner liner returning to its original shape after being deformed, (Page 4, Lines 3-8).

Regarding **Claim 81**, **lan** teaches the outer shell (3) surrounding the front member (CC) and partially surrounding (does not surround the tips labeled as ZZ) the first (DD) and second (EE) side members, and also surrounding the inner liner (1), which rests between a substantially part cylindrical inner surface of the outer shell (3) and an outer face of the front member (CC), an outer face of the first side member (DD) and second side members (EE), (Annotated Figure 2 Above).

The phrase, “thereby protecting the front member and parts of the side members from direct impact and partially surrounds each of the first and second side members,” is considered intended use and is given no patentable weight.

Regarding **Claim 82**, **lan** teaches the inner liner and outer shell being slideable with respect to each other along a central axis of the outer shell, (Page 1, Lines 24-28).

Regarding **Claim 83**, **lan** teaches an outer liner and an inner liner being bonded together, (Page 2, Lines 1-5). Additionally, **lan** teaches the inner liner and outer shell being bonded together using plastic cable ties, (Page 4, Lines 16-20).

Regarding **Claim 86**, **lan** teaches the outer shell and the inner liner composed of polycarbonate and foam, (Page 2, Line 8 and Page 2, Lines 6-7); both materials having

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greater ductility, and impact resilience than the shelving which is made from metal, (Page 1, Lines 12-14).

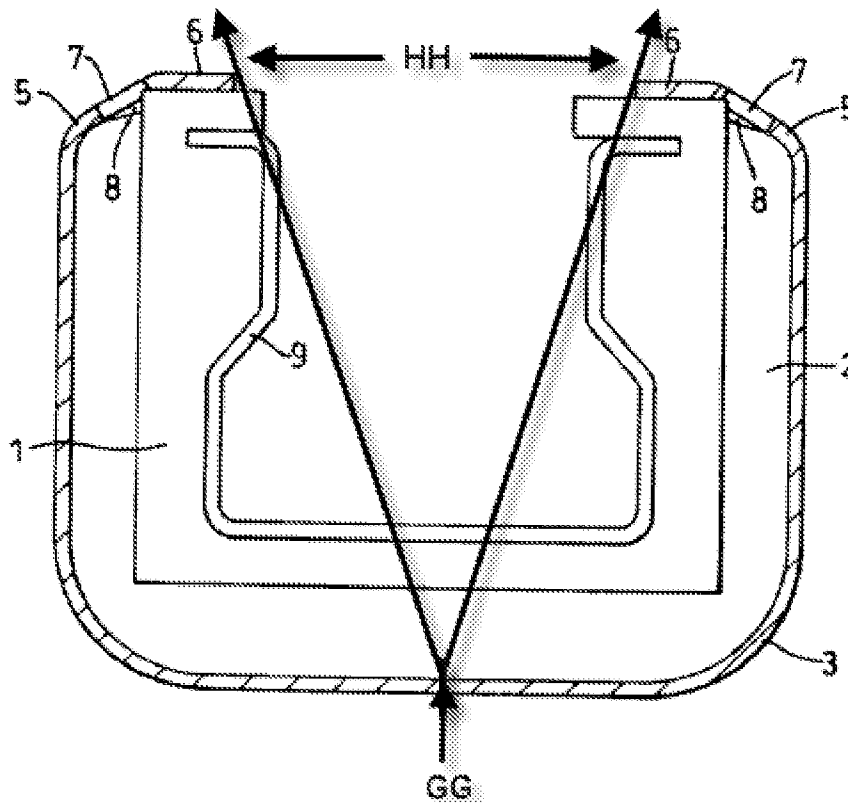
Regarding **Claim 87**, **lan** teaches the device being “capable of” fitting around the upright column so that the outer shell (3) retains to the column (9) without further fixtures, (Page 4, Lines 10-15).

9. Claims 65-69, 74, and 76-79 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.K. Patent Application GB 2,321,688 A (lan) in view of European Patent Application No. 0,571,082 A1 (Boast).

Regarding **Claim 65**, **lan** teaches the outer shell (3) comprising a tubular part cylindrical member (3), (Figure 3); wherein the tube has a pair of substantially parallel opposing edges (6) on either side of a gap, (Figure 2). **lan** does not teach the cylindrical member extending over an angle in the range of 260 to 280 degrees, but does teach a range (HH) about a longitudinal centre line (GG) of the outer shell (3) which is very similar to the claimed range, (Annotated Figure 2 Below). Therefore, the examiner points to case law *In Gardner v. TEC Systems, Inc.*, 725 F.2d 1338, 220 USPQ 777 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 830, 225 USPQ 232 (1984). The court found that if the only difference between the prior art device and the claims was a recitation of relative dimensions and a device having those claimed dimensions would not perform differently than the prior art device, the claimed device was not patentably distinct from the prior art device (See MPEP 2144). It would have been obvious to one of ordinary skill in the art to modify the prior art device of **lan as modified by Boast** to have the

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cylindrical member extending over an angle in the range of 260 to 280 degrees for the purpose of user design as it would not cause the device to perform differently.



Annotated Figure 2

Regarding **Claims 66-68**, **lan as modified by Boast** teaches the limitations discussed above in addition to teaching various dimensional aspects of the claimed invention. **lan as modified by Boast** does not teach the exact dimensional aspects as recited in claims 66-68. However, the examiner points to case law *In Gardner v. TEC Systems, Inc.*, 725 F.2d 1338, 220 USPQ 777 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 830, 225 USPQ 232 (1984). The court found that if the only difference between the prior art device and the claims was a recitation of relative dimensions and a device having those claimed dimensions would not perform differently than the prior art device, the

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claimed device was not patentably distinct from the prior art device (See MPEP 2144). Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention to provide the column protector of **lan as modified by Boast** with a height between 30-120cm, or an external diameter of 10-14cm or an outer wall thickness between 7-9mm since the column protector of **lan as modified by Boast** would not differently then it would before with its previous dimensions.

Regarding **Claim 69**, **lan as modified by Boast** teaches the limitations as discussed above in addition to lan teaching a pair of opposing edges (6) apart from one another at a given distance, (Figure 2). **lan as modified by Boast** does not teach that given distance being between 5cm and 11cm. However, the examiner points to case law *In Gardner v. TEC Systems, Inc.*, 725 F.2d 1338, 220 USPQ 777 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 830, 225 USPQ 232 (1984). The court found that if the only difference between the prior art device and the claims was a recitation of relative dimensions and a device having those claimed dimensions would not perform differently then the prior art device, the claimed device was not patentably distinct from the prior art device (See MPEP 2144). Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention to provide the distance between the opposing edges of **lan as modified by Boast** to be between 5cm and 11cm as this would not affect the functioning of the device of **lan as modified by Boast**

Regarding **Claim 74**, **lan as modified by Boast** teaches the limitations as discussed above, in addition to teaching the inner liner (Figure 1(b)) having a U-shaped channel formed with given dimensions. **lan as modified by Boast** does not teach those

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given dimensions being in the range of 2 to 5cm. However, the examiner points to case law *In Gardner v. TEC Systems, Inc.*, 725 F.2d 1338, 220 USPQ 777 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 830, 225 USPQ 232 (1984). The court found that if the only difference between the prior art device and the claims was a recitation of relative dimensions and a device having those claimed dimensions would not perform differently than the prior art device, the claimed device was not patentably distinct from the prior art device (See MPEP 2144). Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention to provide the column protector of **lan as modified by Boast** with a distance between the outer part cylindrical surface and the outer surface of the U-shaped channel between 2-5cm since the column protector of **lan as modified by Boast** would operate equally the same with any desired dimensions.

Regarding **Claims 76-79, lan as modified by Boast** teaches the limitations discussed above in addition to teaching various dimensional aspects of the claimed invention. **lan as modified by Boast** does not teach the exact dimensional aspects as recited in claims 76 and 77. However, the examiner points to case law *In Gardner v. TEC Systems, Inc.*, 725 F.2d 1338, 220 USPQ 777 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 830, 225 USPQ 232 (1984). The court found that if the only difference between the prior art device and the claims was a recitation of relative dimensions and a device having those claimed dimensions would not perform differently than the prior art device, the claimed device was not patentably distinct from the prior art device (See MPEP 2144). Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention to provide the inner liner of **lan as modified with Boast** with a

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height between 30-120cm, or an external diameter of 10-14cm since the column protector of **lan as modified by Boast** would operate the same with any desired dimensions.

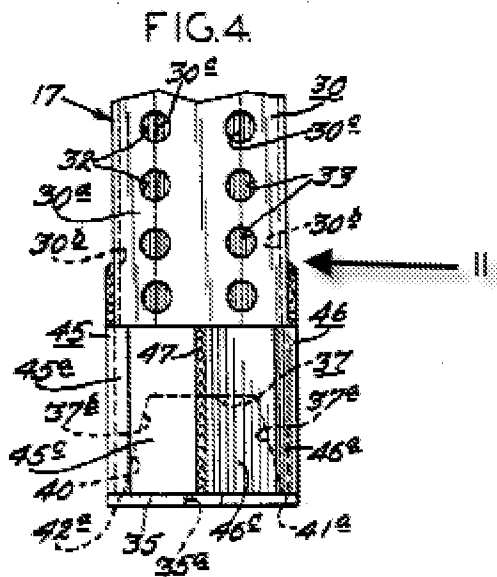
Regarding **Claims 78 and 79**, **lan as modified by Boast** teaches the limitations as discussed above, in addition to **lan** teaching the inner liner (2 or 1) being U-shaped and having a given width and depth dimension, (Figures 1(a) and 1(b)). **lan as modified by Boast** does not teach the exact dimensional aspects of the width and depth dimensions as recited in claims 78 and 79. However, the examiner points to case law *In Gardner v. TEC Systems, Inc.*, 725 F.2d 1338, 220 USPQ 777 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 830, 225 USPQ 232 (1984). The court found that if the only difference between the prior art device and the claims was a recitation of relative dimensions and a device having those claimed dimensions would not perform differently than the prior art device, the claimed device was not patentably distinct from the prior art device (See MPEP 2144). Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention to provide "U" shaped channel of the inner liner of **lan as modified with Boast** with width in the range of 7 to 12 cm, or a depth in the range of 2 to 4cm since the column protector of **lan as modified by Boast** would operate the same with any desired dimensions.

10. Claim 70 is rejected under 35 U.S.C. 103(a) as being unpatentable over U.K. Patent Application GB 2,321,688 A (lan) in view of European Patent Application

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No. 0,571,082 A1 (Boast), and further in view of U.S. Patent No. 4,088,229 (Jacoby et al.).

Regarding **Claim 70, lan as modified by Boast** teaches the limitations discussed above, but does not teach the outer shell having a chamfered edge. However, **Jacoby et al.** teaches a shell of a protector having a chamfered edge (II) between its outer and inner surface, (Annotated Figure 4 Below). Therefore, it would have been obvious to one of ordinary skill in the art to modify **lan as modified by Boast** to have the outer shell with chamfered edges as taught by **Jacoby et al.** for the purpose of user efficiency and improved protection of the upright column.



Annotated Figure 4

11. Claim 84 is rejected under 35 U.S.C. 103(a) as being unpatentable over U.K. Patent Application GB 2,321,688 A (lan) in view of European Patent Application

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No. 0,571,082 A1 (Boast), And further in view of U.S. Patent No. Re 32,406 E (Molari, Jr.)

Regarding **Claim 84, lan as modified by Boast** teaches the limitations as discussed above, but does not teach an polycarbonate outer sheath on the outer shell. However, **Molari, Jr.** teaches of layers of polycarbonate for impact protection, (Column 1, Lines 18-29). Therefore, it would have been obvious to one of ordinary skill in the art to modify **lan as modified by Boast** to have an additional polycarbonate sheath as taught by **Molari, Jr.** for the purpose of added protection. Furthermore, it is an inherent property of carbonate to crack under a given amount of force.

12. Claim 85 is rejected under 35 U.S.C. 103(a) as being unpatentable over U.K. Patent Application GB 2,321,688 A (lan) in view of European Patent Application No. 0,571,082 A1 (Boast), And further in view of U.S. Patent No. 5,746,622 (Consoli et al.).

Regarding **Claim 85, lan as modified by Boast** teaches the limitations as discussed above, but does not teach a polycarbonate insert. However, **Consoli et al.** teaches a polycarbonate insert (150) which is “capable of” being inserted between the inner liner (as it is collapsible foam) and the front face of a column, which is capable of being removed and re-inserted for visual inspection without removing the outer or inner liners, (Figure 3 and Column 4, Lines 1-15). Therefore, it would have been obvious to one of ordinary skill in the art to modify **lan as modified by Boast** to have a

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polycarbonate insert as taught by **Consoli et al.** for the purpose of efficiently testing the device.

It should be understood that the use of “capable of” is the same as “adapted for” in that the prior art device needs to only be “capable of” performing the recited function. It should be understood then that Claim 85 only positively cites the existence of a polycarbonate insert, and a use of which it must be “capable of” performing.

Response to Arguments

13. Applicant's arguments filed 07/10/08 have been fully considered but they are not persuasive.

Applicant argues that the prior art does not teach the column protector device having limitations which are:

- “a rigid substantially part cylindrical “C” shaped cross section outer shell..”
- “substantially solid part cylindrical member having a substantially part cylindrical outer face..”
- “a substantially “U” shaped channel..”

However, all of these limitations have the common aspect of using the term “substantially” which leaves all of these limitations as open to broad interpretations, which in turn allows the prior art device to reject the claimed limitations as recited.

Applicant also argues that the addition of the following limitation makes the claims allowable:

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-“said column protector device is arranged to clip onto said upright column in order to grasp said upright column”

However, the limitation as claimed does not recite that the column protector attaches to the upright column “in a self attaching manner without the need for any additional fixings” as is argued by the applicant. Therefore, it should be understood that the use of ties to clip the column protector onto a column rejects the limitation as it is currently recited.

Conclusion

14. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

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15. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Josh Rodden whose telephone number is (571) 270-5222. The examiner can normally be reached on M-Th 7am-5:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Lanna Mai can be reached on (571) 272-6867. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Joshua Rodden/
Examiner, Art Unit 3637

/Lanna Mai/

Supervisory Patent Examiner, Art Unit 3637